Supreme Court, U.S.
FILED

05-304 MAY 10 2005

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

REBECCA LORUSSO-SMITH

V.

GEORGIA DEPARTMENT OF CORRECTIONS,
et al.

PETITION FOR WRIT OF CERTIORARI
11th. Circuit Court of Appeals

Rebecca Lorusso - Smith
Appellant - PRO-SE
386183 G-1
Lee-Arrendale State Prison
P.O. Box #709 Alto, Georgia
30510-0709

QUESTIONS

1) Was Not *Hope v. Pelzer* supposed to **end** the lower courts "granting of credibility" especially to Prison officials which they still do with impunity, **ignoring** the chastisement by the United States Supreme Court?

2) Does a prisoner who exhaustively fights purported retaliation of her First Amendment Rights by dint of her sheer effort to do so, thereby unwittingly prove that they were not violated?

3) Was it proper for the Appeals Court to ignore a pattern of overwhelming proof Georgia systematically retaliates toward litigants? Sister Appeals Courts have recognized acts against single individuals. The Doctrine of Continuing Violations proves Civil Rights are still denied on a rising scale.

4) Can Constituitional Rights be subject to a mere superficial look with the attitude of "looks alright to me" assessment. Did not *Hope* dictate otherwise? Plain error review using Rule 52 (b) did not satisfy in this case. It was haphazard. Has not this affected and denied fairness, integrity, and a proper public perception of judicial proceedings?

5) Can a prison maintain inmate smoking and not control ETS for C.O.P.D. and Asthmatic inmates and not be in violation of : Americans with Disabilities Act ; Rehabilitation Act ; and the Civil Rights of Institutionalized Persons Act?

6) Prisoners doing long time in Georgia are systematically denied adequate medical care, proper nutrition, and consistent aging - care needs? In *Zwickler* this Court stated it is the duty of all federal courts to guard, enforce, protect every right granted or secured by the Constitution.

7) To threaten speech and access to the courts transcends Constitutional limitations or State power. Does not the First Amendment reserve this from official's control.?? Is this not *Chill?*

8) Should a severly disabled, diabetic, 66 year old prisoner be locked-down for seeking to avoid **amputation** of feet and limbs? Can Hearing-Impaired prisoner be mocked and humiliated for not being able to hear, and refusal to allow repairs and batteries for Hearing Aids?

9) Can the prison receive millions of Federal Government dollars yet retaliate for protest, grievances, and whistleblowing litigants?

Can Americans with Disibilities Act guaranteed and already given rights, be denied for First Amendment use ?

10) Was not *Hope* and more a message from this Supreme Court for the 11th. Circuit to cease the "put-down" of an inmate and BLIND FAITH in public officials and their mendacity ?

11) Federal Rules of Evidence 106 is violated when one party introduces in evidence **perjury** and the other party cannot tell of the perjury, which should in fairness be considered contemporaneously with it. Is not this helping public officials use misleading deletions or misrepresenting issues? This is in fact reinforcing the testimony of a government witness.

12) Can Appellant be denied Discovery with random, pat, peurile, and "off-the-wall"comments then see the fact she received No Discovery be used against her by the District Judge and the 11th. Circuit? The same agency that denied Discovery to Lorusso was found in **Contempt** of a Federal Court -by - Northern District Senior Judge Marvin Schoob.

13) Can the 11th. Circuit Court of Appeals ignore a pattern (read M.O.) that offers overwhelming proof, day after day, deed after

deed, that the Georgia Prison System will systematically retaliate against litigants? A sister Appeals Court can rule, "A Continuing Violation may ... be established ... by demonstrating a series of related acts against a single individual, one or more of which falls within the limitation period." Should not the Supreme Court settle the matter since on an average in America prison guards are retaliating daily to some 15,000 inmates, and this Court should decide the fate of a Doctrine of Continuing Violations which proves Civil Rights are still denied?

14) The Doctrine of Continuing Violations should be a threshold matter to this Supreme Court because a plethora of diverse approaches are churned out that mean the 11th.Circuit has precluded the sort of reflection and open Collegial consultation that ought to be part and parcel of deciding an appellate case. The 11th. Circuit seems to believe the Supreme Court decided *Hope* as a novelty and it can still side with public officials and just let inmates stew in extremely risky and very unconstitutional prison environments. Can the 11th Circuit condemn inmates by placing all

its faith and trust in a highly suspect Georgia Department of Corrections?

15) Should the Constitutional Rights of Lorusso be subject to a mere superficial look when these enumerated Rights at stake are hardly Vindicated by such a "looks alright to me" assessment? Does the dragging of collective judicial feet insure *Hope* is not 100% held as a mandated precedent? Has plain error denied Lorusso a Constitutionally-Mandated process and the outcome of that process (**jury verdict**) cannot be known until the process actually takes place? Does this plain error satisfy the Affecting Substantial Rights prong of Rule 52 (b)? Will the burden on the judicial system be reduced if plain error review is so haphazard, like an English game of darts? Not utilizing the Doctrine of Continuing Violations, in fact totally ignoring it and its sister circuit court rulings, the 11th. Circuit has seriously affected the fairness, integrity, and public reputation of judicial proceedings, and denied Lorusso substantial Rights. Is not this equated with causing a **"Miscarriage of Justice"** ?

16) Can the Americans with Disabilities Act Accessibility

Guidelines for Buildings and Facilities issued by the United States Archetectural and Transportation Barriers Compliance Board as set forth in the Federal register [ADAAG] be denied all the crippled, disabled, and handicapped inmates by the Georgia Department of Corrections and the State of Georgia.? Can theFederal Fair Housing Amendments Act of 1988 be denied as to no practical terrain or characteristics in accordance with Public Law 100 - 430? Light switches, grab-bars, wall-bars, electrical outletsseats, safe lockers, inadequate lighting (one 60 watt bulb) are not easily accessible or available?

United States Court of Appeals
Eleventh Circuit.

Appeal Number: 04-13338-DD

Certificate of Interested Persons

1) BAKER, Thurbert - Attorney General.

2) BROWN, Peter - State Attorney.

3) CHASE, Alexis - Warden at Washington State Prison.

4) DOCTOR, James - Former Facilities Director.

5) Georgia Department of Corrections.

6) GRANT, Rudy - Counselor.

7) JONES, Bertha - Former acting Warden of Care & Treatment.

8) LANTHRIP, Kathy - Deputy Warden of Care & Treatment.

9) LEONARD, Gregory - Clerk, Middle District Court.

10) MCBRIDE, Craig, Captain at W.S.P.

11) MICKENS, Sue - Counselor.

12) MOLTON, Debbie - Deputy Warden of Administration.

13) RINER, Garland - Deputy Warden of Security.

14) ROGERS, Michael - Medical Doctor at W.S.P.

15) ROYAL, C. Ashley - Judge, District Court.

16) SESSIONS, Emma - Former Warden at W.S.P.

17) SIKES, Jimmy - Regional Director for GDC (Over Chase.)

18) TINKLER, Wm. - State Attorney.

19) WILEY, CO-2 - Mail Room Clerk, W.S.P.

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UNITED STATES SUPREME COURT

Table of Citations.

1) Americans with Disabilities Act = 42 U.S.C. Section 12102

(a) 42 U.S.C. Section 12132

2) *Allen v. Iranon,* 99 F. Supp 2d 1216, upheld 283 F.3d 1070

(9th. Cir. 2002)

3) *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct.

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4) *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 - 48,

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5) *Anthony v. County of Sacramento Sheriff's Dept.,* 845

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6) *Bender v. Southland Corp.,* 749 F.2d 1205, 1210 - 11 (6th.

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7) *Boag v. MacDougall,* 434 U.S. 364, 365, 102 S.Ct. 700

(1982)

8) *Bounds v. Smith,* 430 U.S. 817, 828, 97 S.Ct. 1491

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9) *Bridges v. Russell,* 757 F.2d 1155 (11th. Cir. 1985)

10) *Bruce v. Yist,* 351 F.3d 1283, 1288, (9th. Cir. 2003)

11) *Buise v. Hadkins,* 584 F.2d 223 (7th. Cir. 1978)

12) *Burnett,* 31 F.3d 815 - 16

13) *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct.1105(1974)

14) *Delaware v. Fenster,* 474 U.S. 15, 19, 106 S.Ct. 292 (1985)

15) *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285 (1976)

16) Federal Jury Practice and Instruction, E. DeWitt, C. Blackman, & M. Wolff Section 103.23 (4th. Ed. 1987)

17) *Fonda v. Gray,* 707 F.2d. 435, 438 (9th. Cir. 1983)

18) *Frazier v. DuBois,* 922 F.2d 560, 56. -62 (10th. Cir. 1990)

19) *Garcia v. SUNY Health Science Ctr.,* 280 F.2d 98, 112 (2nd. Cir. 2001)

20) *Giano v. Senkowski,* 54 F.3d at 1057 (2nd. Cir. 1995)

21) *Gill v. Mooney,* 824 F. 2d. 1192, 194 (2nd. Cir. 1987)

22) *Gowins v. Greiner,* 2000 U.S. Dis Lexis 14098 (S.D.N.Y. July 31, 2002

23) *Green v. Los Angeles County Superintendant of Schools,* 883 F.2d 1472, 1480, (9th Cir. 1989)

24) *Gregg v. Georgia,* 428 U.S. 153, 230 S.Ct. 2909

25) *Grimes v. City & County of San Francisco,* 951 F.2d 236, 238 - 39 (9th.Cir.1989)

26) *Gutierrez v. Lynch,* 826 F.2d 1534, 1536 (6th. Cir. 1987)

27) *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 114 S.Ct. 365 (1993)

28) *Helling,* 509 U.S. at 25

29) *Hines v. Gomez,* 108 F.3d 265 (1997)

30) *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 2515 (2002)

31) *Hudson v. McMillian,* 503 U.S. 1, 5, 8,, 112 S.Ct. 995, 998 (1988)

32) *Kungys v. U.S.,* 485 U.S. 759, 771, 108 S.Ct. (1988)

33) *Lamar v. Steele,* 697 F.2d 559, 562, (5th. Cir. 1982)

34) *Luckie v. Ameritech,* 389 F.3d 708, 713, (7th. Cir. 2004)

35) *Madewell v. Roberts,* 909 F.2d 1203 (8th. Cir. 1990)

36) *McDonnel Douglas Corp. v. Green,* 411 U.S. 792, 802 - 05, 93 S.Ct. 1817

37) Miscarriage of Justice in Potentially Capital Cases, H. Bedail & M.Radelet 40 Stan. L.Rev. 21126 (1987)

38) *Pell v. Procunier,* 417 U.S. 817, 922, 94 S.Ct. 2800 (1974)

39) *Perry v. Sindermann,* 408 U.S. 593, 597 - 98, 92 S.Ct. 2694 (1972)

40) *Plyer v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 2399 (1994)

41) *Pratt v. Rowland,* 65 F.3d 802 (9th. Cir. 1995)

42) *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252 - 58, 109 S.Ct. 1775 (1989)

43) Rehabilitation Act 29 U.S.C. Section 705 (20) (B) 29 U.S.C. Section 794 (a)

44) *Resnick v. Hayes,* 213 F. 3d 443, 449 (9th. Cir. 2000)

45) *Rizzou v. Dawson,* 778 F.2d 527, 532 (9th. Cir. 1985)

46) *Robinson v. California,* 370 U.S. 660, 666, 82 S.Ct. 1417

47) *Sandin v. Connor,* 515 U.S. 472, 487, 115 S.Ct. 2293 (1997)

48) *Sharazz v. Vacco,* 1998 U.S. Dist. Lexis 20135 1998 WL

49) *State v. Rolon,* 259 Conn. 156, 173, 777A 2d. 604 (2001)

50) *Tinner,* 308 F.3d at 708

51) *Tubos,* 292 F.3d 471 (5th. Cir.)

52) *United Steelworkers of America v. Phelps Dodge,* 865 F.2d 1539, 1541, 1549, (9th. Cir 1983)

53) *U.S. ex rel. Berge v. Trustee of Univ. of Ala.,* 104 F. 3d 1 1453, 159 (4th Cir. 1997)

54) *U.S. v. Burns,* 162 F.3d 840, 852 - 53 (5th. Cir. 1998)

55) *U.S. v. Davis,* 285 F.3d 378, 381 - 82 (5th. Cir. 2002)

56) *U.S. v. Olano,* 507 U.S. 725, 735, 113 S.Ct. 1770 (1993)

57) *Vernon,* 255 F.3d at 1127

58) *Weixel v. Bd. of Educ. of City of N.Y.*, 287 F.3d 138, 146 - 47 (2nd. Cir. 2002)

59) *Whitley v. Albers*, 475 U.S. 312, 318 106 S.Ct. 1078, 1083 (1986)

60) *Wyatt v. Union Mortgage Co.*, 28 Cal. 3d 773, 789 (1979)

IN THE UNITED STATES SUPREME COURT

JURISDICTION OF THIS COURT

Basis for federal jurisdiction in the court of first instance. The District Court took the funds to Appeal to the 11th. Circuit Court and the known place for the next appeal is to the United States Supreme Court.

This is the basis believed this is proper jurisdiction. 28 section 1254 permits cases in the Courts of Appeals may be reviewed by the Supreme Court, (1) By Writ of Certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgement or decree.

Concise Statement of the Case setting out the facts material to the Consideration of the Questions presented.

Appellant Lorusso, a 66 1/2 year old disabled female, suffers from the following : severe arthritis;diabetes type-2; peripheral neuropathy; macular degeneration; a lens implant ; over 380 plantar warts and lesions on neglected feet ; she cannot bend, stoop, squat, nor maintain a prison locker. She also suffers from Asthma, C.O.P.D., is over-weight, and in the past years has been very S.O.B. [shortness of breath]. In retaliation for litigation she was made to leave a handicapped single room, handicapped shower with pull-up bars around the toilet, and room to ambulate in safely, when defendant Chase [Warden] got mad the Law Suit had been filed. Appellant was made to walk on a broken foot for 4 months with no treatment. The tendons and ligaments in a damaged finger also went over 4 months with no care or treatment. Hence, the finger is now

permanently deformed. Appellant is unable to wear a glove or wipe herself properly. She was made to lift heavy property only hours after eye surgery by a cruel racist Lieutenant, causing the eye to hemmorhage, resulting in an emergency trip to the eye-surgeon so intraocular pressure could be relieved via a needle introduced into the eye. Because of fears that Appellant's litigation would win, in January 2002, defendant Riner had Legal material opened, and over 60 pages of legal evidence, affidavits, and records were destroyed. Appellant uses a Commode Riser seat and a Lieutenant was ordered to humiliate Appellant by having her "explain" to 95 inmates whyshe needed it! At times predator inmates were placed in the room and told to throw the Riser against the wall, or on the floor so it would break, and one was told [an HIV person] put some of her blood in Appellant's soup bowl, or cup, belonging to Appellant Lorusso. The harassment never let up, the environment became hostile, dangerous, many bruises were sustained, threats made and on Dec 8, 2003, the Defendants laughed as Defendant Chase told Lorusso she could go home and touch her ***"old, cold, white Mamma"*** if she'd drop the

the Law Suit.!! [Appellant's mother had died on Dec. 7, 2003.] The Parole Board was ready to grant Appellant an Emergency Leave to attend the funeral, but Defendant Chase blocked it in retaliation for the filed litigation! Appellant had in years past been on several furloughs and releases for funerals of other family members, and as a matter of record had left the prison over 100 times and always returned timely! Lorusso's Rights were so *Chilled* she became very scared to utilize them and she got physically sicker, yet she kept on the best she could. Lorusso had the "Audacity" to set down with the Governor of Georgia in the visitation room, along with her husband on Nov. 28, 2002. On Dec. 1, 2002 Lorusso was banned by defendant Chase from using the Law Library where she'd gone for 3 days weekly for 2 hours. A total as of today of 1155 days with no Law Library. She ordered for Lorusso's husband [a heart patient] to be seated near the Microwave ovens when he visited causing him severe illness several times. Appellant Lorusso had only 4 hours of Yard time in 1534 days.!! This is WHY the Doctrine of Continuing Violations was used. The 9th. Circuit court said it could be, as did the 2nd., 6th.,

and 7th Circuits! The 11th Circuit **refused** to help. The lost / stolen 60 pages of Legal material were necessary for the District and 11th Circuit work. *CHILLED* so badly she lost, as the defendants celebrated! ETS was never dealt with, respiratory problems increased, and ALL A.D.A., R.A., aids and helps forbidden her. The name of the game is, and was, **retaliation!**

IN THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

This Court has instructed the Federal Courts to liberally construe the inartful pleadings of PRO-SE litigants. *Boag v. Macdougall,* 434 U.S. 364, 365, 102 S.Ct. 700 (1982).

Comes now, Appellant **Pro-Se**, Rebecca Lorusso - "Smith" to appeal a denial from the 11th. Circuit Brought up several times in the lower courts was the Doctrine of Continuing Violations.

> "The Continuing Violations Doctrine **tolls** the statute of limitations for alleged violations that form part of a pattern of ongoing unlawful conduct. A conspiracy to interfere with Civil Rights is in essence a combination of two or more persons, by concerted actions, to accomplish some purpose through unlawful means, to violate or disregard the law.[Applellant Lorusso] can before a trier of fact demonstrate not only did a conspiracy exist, but these persons in some way, or manner or through contrivance positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan." cite: E. DeWitt, C. Blackman & M. Wolff, Federal Jury Practice and Instructions - section 103:23 (4th. Ed. 1987); *United Steelworkers of America v. Phelps Dodge,* 865 F.2d at 1539, 1541, 1549 (citing *Fonda v. Gray,* 707 F. 2d 435, 438,(9th. Cir. 1983))

The first clue to retaliation was when Defendant Bertha Jones [Acting Deputy Warden] , wrote on a grievance form if Lorusso wrote another grievance her mailroom privileges would be taken away. The "Code of Silence" had commenced! This statement on

the grievance response and Lorusso's letter to Bertha Jones were submitted to the lower courts. In response to repeated grievances that Lorusso wrote, ALL defendants did collectively conspire to Chill the effect of Lorusso's exercise of her First Amendment rights through actions that do not advance any legitimate penalogical goals, nor are tailored narrowly enough to achieve such goals. All rights abused and violated were clearly established. A prison inmate retains those First Amendment rights that are not inconsistent with her status as a prisoner or with the legitimate penalogical objectives of the Corrections system. *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800 (1974) and *Sandin v. Connor,* 515 U.S. 472, 487, 115 S.Ct. 2293 (1997). Even when conditions of confinement do not implicate a prisoner's due process rights, inmates:

> "retain other protection from arbitrary State action ... within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available. "Of fundamental import to prisoners are their First Amendment rights to file prison grievances." *Bruie v. Yist,* 351 F.3d 1283, 1283, 1288 (9th.Cir2003).

The magnitude of retaliatory, physical, emotional, and mental harm done are sufficiently related to constitute a continuing violation. It is well established that a person has a constitutional right to cross-examine the state's witnesses, which may include impeaching or discrediting their credibility by revealing to the Jury the witnesses' biases, prejudices, or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception" *Delaware v. Fensterer* 474 U.S. 15, 19, 106 S.Ct. 292 (1985); *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105 (1974). "To establish an abuse of discretion [defendants] must show that the restrictions imposed upon [the] cross-examination were clearly prejudiced." *State v. Rolon,* 257 Conn.156, 173, 777 A.2d 604 (2001). The rights under the Confrontation Clause are well recognized. What is the difference between perjury in a criminal case and perjury in a deposition by a defendant?? Perjury is a false statement; it is done deliberately to protect one self and to deceive and to hide deeds the Constitution states or implies are illegal, unlawful, criminal. Every denial by the lower courts has been based on credibility that they invested in two

depositions [perjury] by two defendants running scared of their ne farious deeds being exposed. One would believe the lower courts would have more respect for this highest Court's decision in a case out of the 11th. on an Alabama prison. *Hope* was to alert the lower courts the protection, trust, support given prison officials would no longer be tolerated. It was as if the Supreme Court had looked at prison officials with clear brand new glasses. It came as a surprise and it seemed to uphold what Justice O'Connor ruled years ago. "The First Amendment Rights are not lost at the prison door." Out of ALL done to Lorusso over the years [covered under the Doctrine of Continuing Violations] the most diabolical was the statement made by Defendant Chase to Lorusso on Dec. 8, 2003 : " ...drop this May 2002 litigation and you can go touch your cold [Dead] white Mama.!" That violates EVERY TENET of the decency and dignity called for by the 8th. Amendment. Application of the Continuing Violations theory only makes sense in the context of an individual's current experience with respect to the policy or conduct. This doctrine comes into play when a plaintiff [Lorusso] 's claim is based

on conduct occuring, in part, outside the limitations period. Similarly, when liability is premised on a civil conspiracy thatstatute of limitations does NOT commence "until the 'Last Overt act' pursuant to the conspiracy has been completed."." *Wyatt v. Union Mortgage Co.*, (1979) 24 Cal. 3d 773, 786. "A Contining Violation ... may be established ... by demonstrating a series of related acts against a single individual, one or more of which falls within the limitation period." *Green v. Los Angeles County Superintendant of Schools*, 883 F.2d 1472, 1480 - 81 (9th. Cir. 1989). "The key inquiry to determine if the doctrine applies is whether the alleged improper acts are sufficiently related to constitute a Continuing Violation." *Anthony v. County of Sacramento Sheriff's Dept.*, 845 F. Supp. 1396,1402, (E.D. Cal. 1994). "There, as here, the Court can find the statute of limitations does NOT bar any of the (Appellant's) claims since all the allegations are sufficiently related to constitute a continuing violation." *Allen v. Iranon*, 99 F. Supp. 2d 1216, upheld 283 F.3d 1070(9th. Cir. 2002). "A systematic policy of discrimination is actionable even if some or all of the events

evidencing its inception occured past the limitation period." *Grimes v. City and County of San Francisco* 951 F.2d 236, 238-39 (9th. Cir. 1989 Retaliation was a powerful force behind everything the defendants did. From stealing, xeroxing, mutilating, and destroying of **60 pages** [Legal material] unretrievable evidence, research, statements, to a planned "Electrocution Bath" to refusing ALL A.D.A. aids and helps, and forcing Lorusso to be amidst ETS daily. *Sandin v. Connor,* 515 U.S. 472, 115 S.Ct. 2293, 2300 (1995) These were atypical and significant hardships *Pratt v. Rowland,* 65 F.3d 802 (9thCir.1995) *Perry v. Sinderman,* 408 U.S. 593, 597-98 92 S.Ct. 2694 (1972); *Rizzo v. Dawson,* 778 F.2d 527, 532, (9th. Cir. 1985). Some of the injuries asserted are the chilling effects of violations of the First Amendment Filing grievances is a right and is mandated by PLRA. It finally got where Lorusso stayed scared 24X7.

> This "Court has noted prisoners retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments,and the Equal Protection Clause of the 14th.Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available."

Hines v. Gomez, 108 F.3d 265 (1997). " ... nor cruel and unusual punishments inflicted." The 8th. is applicable to the States through the Due Process Clause of the 14th." *Robinson v. Calif.*, 370 U.S. 660, 666, 82 S.Ct. 1417 This Court has exhibited it has deep concerns that the system should facilitate responsible and reliable exercise of discretion. "This Court has shown, even in dissent, that members of the human race cannot be viewed as non-humans, as objects to be toyed with and discarded." Justice Brennan in *Gregg v. Georgia*, 428 U.S.153, 230, S.Ct. 2909. Human error con demns the innocent even: H. Bedau & M. Rodelet, "Miscarriage of Justice in Potentially Capital Cases." 40 Stan. L.Rev. 21, 36 (1987). The 7th. Circuit has instructed that it is appropriate to look at, among other factors, "the frequency with which [alleged discriminatory] acts occur" to determine whether a continuing violation claim is actionable. *Tinner*, 308 F.3d at 708 The same Court has noted, "with respect to hostile environmentclaims, a plaintiff must show that among other things, she was subjected to harassment so severe and pervasive that it altered [her life]. *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th. Cir. 2004) The 5th. Circuit

in *Tubos*, 292 F.3d 471, agreed that the presence of a continuing violation extended the time in which a claim could be brought. The Continuing Violation Doctrine is applicable here because a conspiracy existed that started Dec. 4, 2001, when one defendant, Emma Sessions, was arrested in Columbus, Georgia in a wrecked state vehicle, early AM, 3 X the legally drunk alcohol-blood level, with a loaded firearm, and some blocks away a boy had been victim of "Hit & Run" involving her wrecked car. The state vehicle had damage on the passenger side [and within hours] the GDC Commissioner (Jim Wetherington) sent a flatbed truck there [where he'd once been Police Chief] and ordered the vehicle taken to Atlanta where it was destroyed and compacted.!! Now Evidence was gone! Such is the story of the GDC and its employees. Emma Sessions was at that time Warden over Lorusso. The awesome state-coverups became so obvious and inmate fear and harm grew by leaps and bounds. From Dec. 4, 2001 on, Lorusso had immense Constitutional violations done to her. Defendant Riner took over and loss and destruction ofLegal material occured in Jan. 2002. By March 16, 2002 corrupt Warden Alexis

Hester Chase had assumed office. Diabolical events occured from March 16, 2002 to February 15, 2005. The conspiracy to stop grievances was going full-blast. As of 4/4/2005 the scene has changed to Lee-Arrendale State Prison [Alto, Ga.] but the violations continue to occur. This litigation was filed in May of 2002. As each lower court denied Lorusso help, the GDC celebrated with more deeds. The violations done stretch out like a convoy and they are not "discrete acts that occur the day they happen" (*Morgan*, 536 U.S. at 110), but hostile environment claims whose very nature involves repeated conduct. (*Morgan*, 536 U.S. at 115). This repeated conduct is based on the cumulative effect of individual acts. Put differently, the hostile environment is composed of a series of separate acts that collectively constitute one unlawful practice. Provided that an act contributing to the hostile environment claim occurs within the filing period, the hostile environment may be considered by a Court for the purposes of determining liability. Lorusso can use any act that is part of the same hostile environment and thereby the acts of physical and verbal abuse can be considered totally.

Obduracy and wantonness charcterize the conduct prohibited by the 8th. Amendment and this was conduct prohibited by *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285 (1976). Also, see *Whitley v. Albers,* 475 U.S. 312, 318, 106 S.Ct. 1078, 1083 (1986). Lorusso need not point to a prior case holding the very action in question to be unlawful, the unlawfulness merely must be apparent in light of pre-existing law. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987). **Perjured testimony** was used in the two depositions defendants Chase and Rogers did. The District Judge violatd Federal Rules of Evidence 106 which provides, so far as bears on this case, that when one party introduces in evidence a part of a writing, his opponent "may require the introduction ... of any other part ... which ought in fairness to be considered contemporaneously with it." *U.S. v.Burns,* 162 F.3d 840, 852-53 (5th. Cir. 1998) By relying on the two Depositions the Courts reinforced the testimony of a government witness. Such signaling is improper! *U.S. v. Davis,*285 F. 3d 378, 381 -82 (5th.Cir. 2002). "Materiality, a mixed question of law and fact,

depends on, 'whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action.' " *U.S. ex rel. Berge v. Trustees of Univ. of Ala.* (4th. Cir. 1997) 104 F.3d 1453, 1459; *Kungys v. U.S.*, (1988) 485 U.S. 759, 771, 108 S.Ct.1537. Misrepresentation and / or concealment can occur, frequently does, with the **perjury** the defendants [employed by the GDC] commit. Under FCA, for example, a person who knowingly submits a false statement, false report, to state or a political subdivision in order to conceal, avoid, or decrease an obligation to that entity is liable for treble the damages. Cannot it be the same here? This Court stated in *Harris v. Forklift Systems Inc.*, 510 U.S. 17, 114 S.Ct. 365 (1993) "that harassing conduct must be judged both objectively and subjectively. This means it must be pervasive enough to create an environment that a reasonable person would find hostile and the victim [Lorusso] must subjectively regard the envirnoment as hostile." Ibid/Id. at 21 - 2 The Supreme Court has recognized that "normally, although perhaps not in every case, the defendant must make a specific showing of prejudice [Lorusso did] to satisfy the

'affecting substantial right's prong' of Rule 52 (b)." *U.S. V. Olano,* 507 U.S. 725, 735, 113 S.Ct. 1770 (1993). However, a specific showing of prejudice is not required in circumstances in which an Error has denied the [Appellant] a constitutionally-mandated process and when the outcome of the process cannot be known until the process actually takes place. **Some judge has ruled : where a Jury needed to.** We have not eliminated the biases and prejudices that infect society ; therefore, it should not be sur prising that such problems continue to influence the determination of who is harassed, harmed, chilled and even killed by GDC staff. The prohibition against retaliatory punishment is clearly established law in the 9th. Circuit. That retaliatory actions by prison officials are cognizable under section 1983 has also been widely accepted in other circuits. Those are *Frazier v. DuBois,* 922 F.2d 560, 561 - 62 (10th. Cir. 1990) ;*Madewell v. Roberts,* 909 F.2d 1203, (8th. Cir. 1990) ; *Gill v. Mooney,* 824 F.2d 192, 194, (2nd. Cir. 1987) ; *Buise v. Hudkins,* 584 F.2d 223 (7th.Cir. 1978);and, finally, *Bridges v. Russell,* 757 F.2d 1155, (11th. Cir. 1985) . Yet 20 years later the 11th. Circuit cannot recognize any of the

Continuing deeds done as violating the 1st., 8th., and 14th. Amendments. Like No Law Library from 12-2-2002 until 4-4-2005, is NOT a violation of *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491 (1977)? This is a fundamental constitutional right, is it not? "Within the prison context, a viable claim of retaliation (1st.Amendment) entails 5 basic elements: (1) An assertion that a state actor took some adverse action against an inmate. (2) because of (3) that prisoner's protected conduct, and that such action, (4) harmed the prisoner and, (5) was not narrowly tailored to advance a legitimate correctional goal." *Resnick v. Hayes*, 213 F.3d 443, 449, (9th. Cir. 2000); *Burnett*, 31 F.3d 815 - 16. "A retaliation claim may assert an injury no more tangible than a Chilling effect on First Amendment rights." *Vernon*, 255 F.3d at 1127 Lorusso became scared to utilize her rights. She kept on but deeds like the Law Library barrment she obeyed.The obnoxiousness of ***"drop the May 2002 litigation and you can go touch your old cold white Mama"*** almost sent Lorusso over the edge. Yet the 11th. Circuit ignored it all! Just as in *Hope*. The *Chastisement* from this High Court meant Zero!

It came and it went! SURELY these claims alone were sufficient to ground a cause for action. However; Lorusso was rejected for prosecution of these claims because she fulfilled the requirements necessary topursue her cause of action in Federal Court The "anomaly of protecting only those individuals who remain out of court" is a very shocking rule that cannot be indulged. *Lamar v. Steele,* 697 F.2d. 559, 562 (5th. Cir. 1982) The Prohibition against retaliatory punishment is clearly established law in the 9th. Circuit and there can be no serious doubts that all the harms, threats, denials of seeing her **dead** Mother were harm visited upon Lorusso in response to her exercise of First Amendment rights and went well BEYOND any marginal *Chilling* of her rights. The moving party always bears the responsibility of informing the District Court of the basis for its Motion, and identifying those portions of "the pleadings, deposition, answers to interrogatives and admissions on file, together with affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Gutierrez v. Lynch,* 826 F.2d 1534, 1536, (6th. Cir. 1987) **The State of Georgia**

Knowingly used Perjured Statements! A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,Inc.*,477U.S.242 247-248, 106 S.Ct. 2505 (1986). The lower courts were supposed to examine the evidence and draw all reasonable inferrences in favor of the non-moving party. *Bender v. Southland Corp.*,749 F.2d 1205, 1210 - 11 (6th. Cir. 1984). Despite the Appellant filled an Appendix with proof, this was not evidence of evidentiary quality? The moving party; Deny, wait, play, and then *Wow!* the GDC wins again.!! Refusing deposition for Lorusso was **Contempt of Court** in the Northern District of Georgia, but Not in the Middle District? Lorusso gave evidence the 6th. Amendment says a **Jury** can decide, NOT a Judge. Had PERJURY not been relied on none of this would have occured. Defendant Rogers kept saying, "Lorusso was fine." [Not So!!] 500 females were moved in Bus Convoys April 4th., & April 6,2005, No longer under the psuedo care of Dr. Rogers, Lorusso was seen as the sick and very ill female that she is. She was forced to **crawl** onto a transport bus by the old prison's crew [ones sued] as she was unable to

step-up. 4&1/2 hours later she was admitted to the Alto Hospital in very bad shape. Evidence like this now, prior, and in the beginning, had it been taken before a Jury, would have proven the defendants were very scared to be caught in their maliciousness that posed a risk to many of the female prisoner's lives and has caused the horrible **deaths** of some. If, at any time, the District Court or the Circuit Court had been interested in giving a **Pro-Se Appellant** any break justice-wise, they would have literally construed the inartful pleadings. They never did. That is precisely WHY the Continuing Violations Doctrine was necessary. Taken piece by piece these"Scintillas" could have become a pound, peck, a potful. A clue here, there, somewhere else adds up it is called ***"Modus Operandi"*** [M.O.] for a criminal. If a lay person could read Lorusso's Court work and "add it up" - was it NOT the lower court's responsibility to adhere to the statutory law? Could A.D.A. and R.A. be skirted? Could absolute Chilling be? Could 60 pages of Legal material / Evidence "just disappear" to achieve what the District and Circuit Courts did? In a foiled attempt [Thank God!] of attempting to***Electrocute*** an inmate while taking a shower?

Is bargaining to get litigation dropped [or **blackmail** to see it ended] right? Can thousands of days of being deprived use of Law Library NOT be wrong?? Can ridiculing a 66 year old inmate in front of her dorm mates about a health-aid [Commode Riser] be Constitutional?Can asking an AIDS predator to "doctor" Lorusso's cup or bowl with her disease NOT be wrong? What is wrong to these ***protectors of the prison staff***? If a little girl says someone "touched" her, does it have to be on film? This nightmare of terror in the environment went on over 3 years! Courts need not measure in some scinitilla fashion - if they'll open their EYES and look! It is GDC racketeering that escalates EACH TIME they're threatened with exposure at their "one Billion dollar Plantation." "Escapes" like this and protection by the lower courts helps Georgia to again possess Slaves legally.!! The GDC [by vowing it was doing things to Make Truth in Sentencing real] collected **$87,000,000.oo** from the U.S.Dept of Justice.It makes about**$13,000,000.oo** yearly off inmate phone calls. It makes over **$100,000,000.oo** off prison linens and clothes [Prison Industries] year!And, it will tell youquick it does not have to obey 42 U.S.C. sec

12132 nor 29 U.S.C. sec.794. These are A.D.A. and R.A. Retaliation is forbidden. The expression is, ***"don't make me laugh."*** [It took one Doctor and one Nurse working tandem to clear Lorusso's feet over two hours!] The lesions, callouses, and plantar warts numbered over 380. The pain never ceased. To the defendants, "Lorusso was fine"! They've LIED since day one.!! Disabled inmates are to serve their sentences in units that can accomodate their disabilities. Lorusso furnished evidence andDeeds done. The Court was supposed to assess the legal feasability of this over 3 years long debacle! It did not! It assayed evidence and decided Lorusso had no weight! The lower courts quickly assumed no relief could be granted under any set of facts. Not once giving Lorusso the chance to let a Jury hear **Free World Decent Doctors**! Even 2 Moore's Federal Practice sec. 12.34 [4] [a] was ignored. Even an ELF knows blackmail and at tempted murder are SERIOUS! To survive a motion to dismiss, the sec. 1983 complaint must make specific allegations of facts indicating a deprivation of Constitutional Rights**Lorusso did**!*Shabazz v. Vacco.* 1998 U. S. Dist Lexis 201135, 1998 W.L.

Just with destruction of 60 pages of Legal work, Lorusso wrote a grievance on the mail room. Written by the then acting Warden of Care & Treatment was a threat signed by her and given to Lorusso - if she grieved the mailroom again she'd pay with NO MAIL AT ALL. Both lower courts read it and did Zero. That is called ERROR & RETALIATION. That is cruel. The 8th. Amendment protects prisoners from this. *Hudson v. McMillian,* 503 U.S. 1, 5, 8, 112 S.Ct. 995, 998 (1992) Eighth Amendment is upheld in sec.1983 prison lawsuit alleging unreasonable exposure to second-hand tobacco smoke. *Helling,* 509 U.S. at 25. The 11th. Circuit should have said, "on this record we cannot say Lorusso cannot prove her case, her facts that would entitle her to relief." "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike." *Plyler v. Due,* 457 U.S. 202, 216, 102 S.Ct. 2382, 2394 (1982) "To prove an Equal Protection violation, claimants must prove purposeful discrimination ... directed at an identifiable or suspect class." *Giano v. Senkowski,* 54 F.3d at 1057 (2nd. Cir. 1995)."A damage claim under the A.D.A. against a state (or state agency or

official) is not barred by the 11th. Amendment as long as [Lorusso] can establish that Title II violation was motivated by either discriminatory animus or ill-will due to disability." *Garcia v. S.U.N.Y. Health Sciences Center,* 280 F.3d 98, 112, (2nd. Cir. 2001) The Second Circuit in *Garcia* recognized that "direct proof of this will often be lacking: smoking guns are rarely left in plain view." Lorusso can establish "discriminatory animus" by relying on a burden shifting technique similar to that adopted in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 - 05, 93 S. Ct. 1817 or a motivating-factor analysis similar to that set out in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252 - 58, 109 S.Ct. 1775 (1989). When Congress provides federal funding, it may require that a state agree to waive its sovereign immunity as a condition of accepting those funds. Georgia did.!! To state a claim under A.D.A. and R.A. a plaintiff must plead that " (1) She has a disability for purposes of 504 ADA. (2) She is otherwise qualified for the benefit that has been denied, and (3) She has been denied the benefit by reason of the disability. The District Court failed to apply the

liberal pleading standard afforded Pro-Se litigants. *Weixel v. Bd. of Education of the City of New York*, 287 F.3d 138, 146-47 (2nd. Cir. 2002).42 U.S.C. section 12132 "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by any such entity." 29 U.S.C. section 794 (a) = provides a pertinent part: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial Assistance." 42 U.S.C. section 12102 (2) - entity if public.29 U.S.C. section 705 (20) (B) receives federal monies. See: *Gowins v. Greiner*, 2002 U.S. Dis Lexis 14098 (S.D.N.Y. July 31, 2002)

CONCLUSION

The events and deeds, all unconstitutional and "risk endangerment full" covered a period of January 2002 to April 2005. A period full of horror. Appellant learned a doctrine could cover all deeds because a pattern emerged as evidence. Too much was steadily done: humiliation, embarassment, falls, lock-downs, deprivation, the taking of any safety in a bath, the tobacco smoke kept increasing, no place in the dining hall to sit, no place to sit on in the yard, and no understanding of the use of Lorusso's Cane and knee braces, the times Lorusso could not walk to pill call or meals because of inclement weather or legs that were too painful to walk on - the kitchen detail she was assigned to [to cause physical harm] in Jan. 2002 that Defendant Riner thought so amusing he remarked, "I'd love to see you washing pots with one hand and holding that Cane with the other." This was a detail where the floor was greasy, water-filled, slick and a place of high-risk endangerment. This **dangerous detail was in retaliation for litigation.!!** Lorusso believes the hostile environment, the continuing violations, all ordered by WardenChase, Dep.Warden Riner, and Dr. Rogers,

set up a place of death or so it was hoped the conditions would bring about Lorusso's demise. Lorusso heard all she could take on Whistleblowing, Exposes, Deaths, Neglect- Just as she was told she was too old to get any help by Dr. Rogers. He believed the stock reply fit Lorusso:" It costs too much and you're over 50, you're too old, Rebecca." !! Now Warden Chase is gone due to pressure, the hostile environment was discovered and to hide it 500 females were shipped-out on April 4, & 6, 2005 to the Northeast Georgia prison where lawsuits abound, many were raped and murdered and females are to adjust, or else ...

APPENDIX

Items A through E

(A) Judgement - issued as Mandate by 11th Circuit, U.S. Court of Appeals, February 22, 2005

(B) Denial of Rehearing Petition - March 22, 2005 11th.Cir.

(C) Recommendation - March 18,2004 U.S.D.C. - M.D. of Ga.

(D) Contempt Order by Senior Judge Marvin Shoob, Northern District Court.

(E) Commission on Safety & Abuse in Americas' Prisons.

Apendix A

United States Court of Appeals
For the Eleventh Circuit

No. 04-13338

District Court Docket No.
02-00157-CV-CAR-5-1

REBECCA LORUSSO-SMITH,
Plaintiff, Appellant

vs

GEORGIA DEPARTMENT OF CORRECTIONS,
ALEXIS CHASE, Warden, Washington State Prision,
individual, personal and official capacities, et al.,
Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

JUDGEMENT

It is hereby ordered, adjudged and decreed that the attached opinion included herein by reference, is entered as judgement of this Court.

Entered: February 22, 2005
For the Court : Thomas K. Khan, Clerk
By: Gilman Nancy

ISSUED AS MANDATE
March 30, 2005
U.S. COURT OF APPEALS
ATLANTA GEORGIA

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 22,2005
THOMAS K.KHAN,CLERK

United States Court of Appeals
For the Eleventh Circuit

No. 04-13338
Non Arguement Calendar

D. C. Docket No. 02-00157-CV-CAR-5-1

REBECCA LORUSSO-SMITH,
Plaintiff, Appellant

vs

GEORGIA DEPARTMENT OF CORRECTIONS,
ALEXIS CHASE, Warden, Washington State Prision,
individual, personal and official capacities, et al.,
Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(February 22, 2005)

Before BLACK, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Rebecca Lorusso-Smith, a Georgia state prisoner proceeding *pro se*, appeals the district court's grant of a summary judgement in her 42 U.S.C§ 1983 action.

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 22,2005
THOMAS K.KHAN,CLERK

Lorusso - Smith's claims, though scattered, can be grouped into the following categories: (A) deliberate indifference to medical needs; (B) exposure to secondhand smoke; (C) violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C.§§ 12131-65, and Rehabilitation Act, 29 U.S.C.§ 701 *et seq.*; (D) denial of access to the courts; and (E) retaliation for filing grievances and lawsuits.[1]

This Court rules *de novo* the district court's grant of summary judgement, viewing all evidence and factual inferences reasonably drawn from the evidence in the light most favorable to the non moving party. *Burton v. Tampa Housing Authority*, 271 F.3d 1274, 1276-77 (11th Cir. 2001). Summary Judgement is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show there is no genuine issue as to any material fact

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1.Lorusso-Smith also claims judicial bias. Upon review of the record and upon consideration of the parties' briefs, we find this claim to be without merit, and will not address it further in this opinion. She further argues that prision officials have violated her rights under the CRIPA, 42 U.S.C.§1997 *et seq.*;however, she offered no arguement in support of this issue, either in district court or on appeal; therefore, it is abandooned. *See Love v. Deal*, 5 F.3d 1406, 1407 n.1 (11th Cir. 1993)

and that the moving party is entitled to judgement as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986)

Once the moving party has properly supported its motion for summary judgement, the burden shifts to the nonmoving party to come forward with specific facts showing that there is genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574,587,106 S.Ct. 1348,1356 (1986) (quoting Fed. R. Civ. P. 56(e)). A party opposing a properly submitted motion for summary judgement may not rest upon mere allegations or denials of pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby , Inc*, 477 U.S. 242,249,106 S.Ct. 2505,2511 (1986). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F2d 1573,1577 (11th Cir. 1990).

A. Deliberate Indifference to Medical Needs

Deliberate indifference to an inmate's serious medical needs violates the 8th Amendment. *Estelle v. Gamble*, 429 U.S.97, 104, 97 S.Ct. 285,291 (1976). In *Estelle*, the Supreme Court reasoned that "an inmate must rely on prison authorities to treat his medical needs; if authorities fail to do so, those needs will not be met." *Id.* at 103,97 S.Ct. at 290. Every claim by a prisoner of inadequate medical treatment, however, does not state a violation of the Eighth Amendment. *McElligott v. Foley*, 182 F 3d 1248, 1254 (11th Cir. 1999).

Medical treatment violates the Eight Amendment only when it is "so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Harris v. Thigpen*, 941 F. 2d 1495, 1505 (11th Cir. 1991) (citations omitted). To show an objectively serious deprivation of medical care, an inmate must demonstrate (1) an objectively serious medical need that, left unattended, poses a substantial risk of serious harm and (2) that the response made

by public officials to that need was poor enough to constitute "an unnecessary and wanton infliction of pain," and not merely accidental inadequacy, negligence in diagnosis or treatment, or even medical malpractice actionable under state law. *Taylor v. Adams*, 221 F. 3d 1254, 1258 (11th Cir. 2000). In addition, to show the required subjective intent to punish, a plaintiff must demonstrate that the public official acted with an attitude of "deliberate indifference," by demonstrating (1) awareness of facts from which the inference could be drawn that a substantial risk of serious harm existed, and (2) the drawing of this inference. *Id.* at 1258

Because an inadvertent failure to provide adequate medical care does not constitute "unnecessary and wanton infliction of pain", a prisoners complaint "that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendments." *Estelle*, 429 U.S. at 105-06, 97 S. Ct. at 292. "To state a cognizable claim, a prisoner must allege

acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id* at 106, 97 S.Ct. at 292.

On appeal, Lorusso-Smith argues that the defendant demonstrated deliberate indifference to her medical needs by (1) delaying treatment for an injured finger, and (2) assigning her to kitchen detail. Addressing Lorusso-Smith's claims of medical indifference, the defendants submitted the affidavit of Michael Rogers, M.D., who treated inmates at Washington State Prison when the events Lorusso-Smith complained of occurred. Dr. Rogers affidavit and accompanying medical records show that Lorusso-Smith regularly received medical care. Further, Dr. Rogers declared that, "there is no medical reasons that (she) can not perform light work duties, such as in the kitchen or shelter. Overall, for a 63 year old woman with severe obesity, {Lorusso} Smith is in good health."

Concerning Lorusso-Smith's claim that she received inadequate treatment for her injured finger, on October 26, 2001,

Lorusso-Smith came to the clinic, but an examination revealed no swelling in her hand and good range of motion so medical staff applied a splint, ordered an x-ray, and scheduled a follow up examination in 14 days. On November 9th 2001, Lorusso - Smiths finger was x-rayed, revealing "no fractures, dislocations, nor bony nor joint abnormalit[ies]." On November 15, 2001, Lorusso Smith reported to the clinic complaining of continued pain in her finger. She was referred to orthopedics for a care plan and instructions on range of motion exercises. On February 12, 2002, a doctor at Central State Hospital examined Lorusso-Smith's finger, and, determining that she had torn a tendon, placed her finger in a splint. The doctor noted that, although permanent deformity of the finger was possible, surgery was not recommended be cause it could lead to other problems.

Considering the evidence before us, we conclude that the evidence shows that prison and medical staff were not indifferent to Lorusso-Smith's medical needs. Even if the

medical staff were negligent, without a showing that they were "deliberately indifferent", Lorusso-Smith has failed to establish an Eighth Amendment violation. See *Estelle*, 429 U.S. at 105-06, 97 S.Ct. at 292. As for Lorusso-Smith's claim that she should not have been assigned to kitchen detail because of her medical problems, the evidence showed that she had been cleared for light duty work, such as kitchen detail. Accordingly, we find no reversible error in the district court's conclusion that prison officials were not deliberately indifferent to Lorusso-Smith's medical needs.

B. Exposure to Secondhand Smoke.

The Supreme Court has held that involuntary exposure to environmental tobacco smoke (ETS) can state a claim for cruel and unusual punishment under the Eighth Amendments. *Helling v. McKinney*, 509 U.S. 25,35,113 S.Ct. 2475, 2481 (1993). Eighth Amendment challenges to conditions of confinement are analyzed under a two part test. *Chandler v. Crosby*, 379 F 3d 1278, 1289 (11th Cir. 2004). First the

prisoner must show that the condition she complains of "is sufficiently serious to violate the Eighth Amendment." *Id.* At a minimum, this requires a showing that the condition poses an unreasonable risk of serious damage to the inmate's future health or safety. *Id.* Under the second component, the prisoner "must show that the defendant prison officials acted with a sufficiently culpable state of mind with regard to the condition at issue." *Id* (internal quotations omitted). Whether a smoking policy has been adopted, and how it is administered, should be considered when determining if the prison staff are deliberately ignoring the possible effects of exposure to ETS. *Helling,* 509 U.S. at 36-37, 113 S. Ct. at 2482.

Although Lorusso-Smith had asthma, she submitted no evidence of smoke related injuries, and the medical records Dr. Rogers submitted reveal none either. Lorusso -Smith never complained about, or sought medical attention for, exposure to secondhand smoke. Moreover, government statistics Lorusso-Smith pointed to, about the effects of secondhand smoke

are insufficient to state an Eighth Amendment violation. *See Chandler*, 379 F. 3d at 1289. Additionally, the evidence showed that prison officials have made an effort to limit contact nonsmokers have with ETS.

We conclude the evidence that the defendants submitted demonstrates that prison officials were not deliberately indifferent to the effects of secondhand smoke on Lorusso-Smith. *See Helling*, 509 U.S. at 36-27, 113 S. Ct. at 2482. Therefore, we find no reversible error in the district court's conclusion that Lorusso-Smith's exposure to second hand smoke does not constitute an Eighth Amendment violation.

C. Violation of the ADA and Rehabilitation Act.

Congress enacted the ADA in 1990 to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.[2] 42 U.S.C.§ 12101(a)(2)&(3); *PGA Tour,Inc. v. Martin*, 532 U.S. 661,374-75,121 S.Ct. 1879,1889 (2001). To effectuate its sweeping

[2] Because the ADA is based upon the Rehabilitation Act of 1973, 29 U.S.C.§ 701 et seq., the courts rely on those cases decided under that Act to interpret similar language in the ADA. *See Cash v. Smith*, 231 F.3d 1301, 1305 & n.2 (11th Cir. 2000)

purpose, the ADA forbids discrimination against disabled persons, in major areas of public life, including among other things, public services. 42 U.S.C.§§ 12135-65.

To state a claim under Title II of the ADA, a plaintiff must show that (1) she is a "qualified individual with a disability," (2) she was "excluded from participation in or... denied the benefits of the services, programs, or activities of a public entity," or otherwise "discriminated [against] by such entity," and (3) "by reason of such disability." 42 U.S.C.§ 12132. The Supreme Court has held that the plain text of the ADA unambiguously extends to state prison inmates. *Pennsylvania Dep't. of Corr. v. Yeskey*, 524 U.S. 206, 210-12, 118 S.Ct. 1952, 1954-56 (1998).

To establish that she is a "qualified individual," the first element under a claim under Title II of the ADA, "the plaintiff must show that [she] is disabled and that [she] meets the essential eligibility requirements for participating in the program, with or without reasonable accommodations."

Miller v. King, 384 F.3d 1248,1265 (11thCir. 2004) (internal quotations omitted). The ADA defines "disability" to include *inter alia*, " a physical or mental impairment that substantially limits one or more of the major life activities of such individual". 42 U.S.C.§ 12102(2)(A).

"If a prisoner is both disabled and an otherwise qualified individual, a state prison may not deny services, programs, or activities merely because the prisoner has a disability." *Miller*, 384 F.3d at 1266. Instead, the "public entity must make its services, programs or activities readily accessible to disabled individuals." *Shotz*, 256 F.3d at 1079-80 (internal quotations and citations omitted). When a prisoner is a "qualified individual," entitled to reasonable accommodations, we have held that "terms like 'reasonable'... are relative to circumstances, and the circumstances of a prison are different from those of a school, office or a factory..." *Miller*, 384 F.3d at 1266. "[C]ourts must be mindful of the necessary balance between the ADA's worthy goal of integration and a

prison's unique need for security, safety and other penological concerns." *Id.*

Lorusso-Smith specifically claims that she is entitled to , and has been denied, a handicap room and shower. She testified that Dr. Rogers informed her that the medical staff determined that she would no longer have access to the handicap shower and further testified that she was removed from the handicap dorm. She did not testify, however, that medical staff had prescribed either of these accommodations.

While there was no medical reason indicating Lorusso-Smith needed to be placed in the handicap dorm, Warden Chase declared that she and her staff nonetheless made efforts to accommodate Lorusso-Smith in other ways. Although there were not wall rails and bars in Lorusso-Smith's non-handicap cell, there was a sink beside the toilet to assist her. So she could avoid using stairs, Lorusso-Smith was housed on the first floor. When prescribed by the medical staff, Lorusso-Smith had a bed wedge. Finally, Warden Chase declared, Lorusso-Smith's

access to and participation in prison programs and activities was not hindered in any way; she chose not to attend.

We conclude that Lorusso-Smith is not entitled to relief under Title II of the ADA. Although Lorusso-Smith arguably established the first element of a claim under Title II of the ADA, Lorusso-Smith did not offer any evidence showing that she was "denied the benefit of the services, programs, or activities " of the prison. *See Miller*,384 F.3d at 1265. Therefore, the district court did not err in concluding that prison officials did not violate Lorusso-Smith's rights under the ADA and Rehabilitation Act.

D. Denial of Access to Courts

The First Amendment grants prisoners a limited constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817,821, 97 S. Ct. 1491,1494 (1977). This right requires that an inmate be provided "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Vanderberg v. Donaldson*

259 F.3d 1321,1323 (11th Cir. 2001). The state may not burden this right with practices that are not reasonably related to penological objectives, nor act with the intent of chilling the First Amendment right. *Harris v. Ostrout*, 65F3d 912,916(11th Cir. 1995).

An inmate alleging lack of access to the courts, however, must show actual injury, *Lewis v. Casey*, 518 U.S. 343,349-51,116S.Ct. 2174,2179-80 (1996), and must rebut the presumption of reasonableness attached to prison regulation, *Harris*, 65F.3d at 916. The essential standing requirement of injury which the inmate must demonstrate is an injury to the right asserted, such as the right to access. *Bass v. Singletary*, 143 F.3d 1442,1445 (11th Cir. 1998). Accordingly, an inmate must show that the prison official impeded her pursuit of non-frivolous, post-conviction claim or civil rights action. *Id.*

Addressing Lorusso-Smith's claims that her access to the courts has been hindered, Warden Chase declared that, while regular mail was opened and checked for contraband,

legal mail was only opened and inspected when it contained metal clasps. We conclude that Lorusso-Smith failed to demonstrate that inspection of her outgoing legal mail hindered her efforts to pursue a nonfrivolous civil rights claim, *See Bass*, 143 F3d at 1445; to the contrary, her numerous filings indicate that she has had more than adequate access to the courts.[3] Accordingly, we find no reversible error in the district court's conclusion that Lorusso-Smith was not denied access to the courts.

E. Retaliation for Filing Grievances and Lawsuits

Prison officials may not retaliate against inmates for filling lawsuits or administrative grievances. *Wright v. Newsome*, 795 F 2d 964,968 (11th Cir. 1986). "To state a [F]irst [A]mendment claim for retaliation, a prisoner need not allege violation of a separate and distinct constitutional right...The gist of a retaliation claim is that a prisoner is penalized

3 Lorusso-Smith also argues that she has been denied access to the law library because of her lawsuit. Although Lorusso-Smith testified as to the denial of law library privleges at her deposition, she did not raise the issue in her complaint. Therefore, this issue was not before the district court, and we will not consider it upon appeal. *See Access Now*, 385 F.3d at 1331

for exercising the right of free speech." *Mitchell v. Farcass,* 112 F.3d 1483,1490 (11th Cir. 1997) (internal quotations omitted). Mere conclusory allegations of retaliation, however, are insufficient to survive a motion for summary judgement. Harris, 65 F.3d at 916.

Lorusso-Smith argues that all the wrongs she suffered were committed by prison officials in retaliation for her filing grievances and lawsuits, but she offers no evidence beyond conclusory allegations in her pleadings and at her deposition. Furthermore, the defendants have offered the sworn affidavits of Dr. Rogers and Warden Chase, which contradict Lorusso-Smith's unsubstantiated allegations. Accordingly the district court did not err in granting summary judgement to Lorusso - Smith for her claims of retaliation.

Because the evidence, if any, Lorusso-Smith submitted in support of her claims was no more than a mere "scintilla", the district court did not err in granting a summary judgement as to all her claims. Accordingly we affirm. **AFFIRMED.**

APPENDIX

B

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.ca11.uscourts.gov

March 22, 2005

Rebecca A. Smith (386183)
Washington State Prison
13262 HWY 24 East
P.O. Box 206
Davidsboro, GA 31018-0206

Appeal Number: 04-13338-DD
Case Style: Rebecca Lorusso-Smith v. GA Dept. of Corr.
District Court Number: 02-00157 CV-CAR-5-1

The enclosed order has been entered on petitio(s) for rehearing.

See Rule 41 Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance of any mandate.

Sincerely,

THOMAS K. KAHN, Clerk
Reply To: Regina Veals-Gillis (404) 335-6163

Encl.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13338-DD

REBECCA LORUSSO-SMITH,
Plaintiff Appellant,

versus

GEORGIA DEPARTMENT OF CORRECTIONS, ALEXIS CHASE, Warden, Washington State Prison, individual, personal and official capacities, GARLAND RINER, Deputy Warden, Washington State Prison, individual, personal nad official capacities, RUDY GRANT, Deputy Warden, Washington State Prison, individual, personal and official capacities, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Georgia

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BEFORE: BLACK, WILSON and PRYOR, Circuit Judges
PER CURIAM:
The petition(s) for rehearing filled by Appellant Rebecca A. Lorusso-Smith is **DENIED**

ENTERED FOR THE COURT

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT
MAR. 22,2005
THOMAS K.KHAN,CLERK

"s/Signature Unreadable"
UNITED STATES CIRCUIT JUDGE

ORD -41

APPENDIX
C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

REBECCA LORUSSO-SMITH
PLAINTIFF
VS.
GEORGIA DEPARTMENT OF
CORRECTIONS, et al,
DEFENDANTS

FILED
U.S. District Court
Middle Georgia
04 MARCH 18
3:00P.M.

NO. 5:02-CV-157-1(CAR)
Proceedings Under 42 U.S.C.§ 1983
Before the U.S. Magistrate Judge

RECOMMENDATION

Plaintiff REBECCA LORUSSO-SMITH is an inmate in the custordy of the state of Georgia.She has sued defendants WARDEN ALEXIS CHASE, DEPUTY WARDEN GARLAND RINER,DEPUTY WARDEN RUDY GRANT, MENTAL HEALTH DIRECTOR BERTHA JONES,OFFICER WILEY, REGIONAL DIRECTOR JIMMY SIKES, DR. MICHAEL ROGERS, FORMER WARDEN EMMA SESSIONS, DEPUTY WARDEN DEBBIE MOLTON, DEPUTY WARDEN OF CARE ANDTREATMENT KATHY

LANTHRIP and COUNSELOR MICKENS[1] alleging that the defendants violated her constitutional rights while she was incarcerated at Washington State Prison in Davisboro, Georgia. The plaintiff alleges that she was subjected to inadequate medical care, dangerous work conditions, unhealthy and unsafe living conditions, retaliation, denial of access to the court, and violations of her rights under the Americans with Disabilities Act (ADA). She also alleges that she has been placed in a variety of dangerous situations in an effort to kill her.

Pending before the court is the defendants' MOTION FOR SUMMARY JUDGEMENT. Tab # 49. The motion is supported by brief, affidavits, depositions and medical records. The court advised plaintiff Lorusso-Smith of said motion and her duty to respond properly thereto. Tab #62. The plaintiff has filled a response to the defendants motion. Tabs 57 & 64.In entering this recommendation, the undersigned has carefully

[1] In her original complaint, plaintiff also sued Jackie Brantly, James Doctor, Scheree Lipscomb, Captain Craig McBride, C.O.II Brown, C.O. II Poole and Jim Wetherington. Tab #8. These defendants were dismissed from the present suit on November 19,2002. Tab # 12.

both the defendants' motion and all attachments thereto, as well as the plaintiff's responses.

LEGAL STANDARDS

A. Summary Judgement

Rule 56 of the *Federal Rules of Civil Procedure* dealing with motions for summary judgement provides as follows:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. A summary judgement, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Summary judgement can only be granted if there are no genuine issues of material fact and if the moving party is entitled to judgement as a matter of law. Fed.R.Civ.P. 56(c); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695F.2d 1294,1296(11thCir.). While the evidence and all factual inferences therefrom must be viewed by the court in

the light most favorable to the party opposing the motion, the party opposing the granting of the motion for summary judgement cannot rest on his pleadings to present an issue of fact but must make a response to the motion by filling affidavits, depositions, or otherwise in order to persuade the court that there are material facts present in the case which must be presented to a jury for resolution. *See Van T. Junkins & Assoc. v. U.S. Industries, Inc.* 736 F.2d 656, 658 (11th Cir. 1984).

Specifically, the party seeking summary judgement bears the initial burden to demonstrate to the court the basis for its motion by identifying those portions of the pleadings, depositons, answers to interrogatories, and admissions which it believes shows there is an absense of any genuine issue of material fact. *Hariston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1988). In determining if the moving party has met this burden, the court must review the evidence and all factual inferences drawn from this, in the light

most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 951 F2d 1235,1237 (11th Cir. 1992) .

If the moving party successfully meets the burden, the burden then shifts to the nonmoving party to establish by going beyond the pleadings, that there are genuine issues of material fact to be resolved by a fact finder. *Clark v. Coats & Clark,Inc.*, 929 F 2d 604,608 (11th Cir. 1991). Genuine issues are those as to which the evidence is such that a reasonable jury could find for the non-movant. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).[2]

B. Discussion

1. Deliberate Indifference

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[2] *See also Matsushita Elec. Indus. Co. Ltd. v Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 11356, 89 L.Ed.2d 538 (1986) (the purpose of summary judgement is to pierce the pleadings and assess the proof in order to see whether there is a genuine need for a trial): *Brown v. City of Clewiston*, 848 F2d 1534, 1543 (11th Cir. 1988) (the question is whether the record as a whole could lead a rational tier of fact to find for the non-movant).

In *Estelle v. Gamble*, the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain',,, proscribed by the Eighth Amendment." 429 U.S. 97,07 S. Ct. 285, 50 L.Ed. 2d 251, rehearing denied 429 U.S. 1066, 97 S.Ct. 798, 50 L.Ed. 2d 785 (1976). However, the course of treatment is "a classic example of a matter of medical judgement." *Estelle*, 429 U.S. at 107 .[3] A mere disagreement between a prisoner and prison officials as to diagnosis or treatment does not give rise to a constitutional violation. *Id.* at 106.

Delay in access to medical attention can violate the Eighth Amendments when it is tantamount to unnecessary

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[3] At most, a mere allegation of improper or untimely treatment, without more, states a claim of medical malpractice cognizable under state law. *Id. See Howell v. Evans*, 922 F2d 712, 719 (11th Cir. 1991) (vacated pursuant to settlement, 931 F 2d 711 (11th Cir. 1991), reinstated by unpublished order (June 24, 1991), cited in *Howell v. Burden*, 12 F 3d 190, 191 n.*(11th Cir. 1994)). Moreover, *Estelle* specifically states that the question of whether an x-ray or additional diagnostic techniques or forms of treatment are indicated are classic examples of matters for medical judgement and that medical malpractice does not become a constitutional violation merely because the patient is a prisoner. 97 S.Ct. at 292-93

and wanton infliction of pain. Cases stating a constitutional claim for immediate or emergency medical attention have concerned medical needs that are obvious even to lay persons because they involve life-threatening conditions or situations where it is apparent that delay would detrimentally exacerbate the medical problem. In contrast, delay or even denial of medical treatment for superficial, non-serious physical conditions does not violate the Eighth Amendments. The seriousness of an inmates medical needs may be decided by reference to the effect of the delay of treatment.

Where the delay result's in an inmates suffering a life-long handicap or permanent loss, the medical need is considered serious. An inmate that complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed. Further, the tolerable length of the delay in providing medical attention depends on the medical need and the reason for the

delay. Consequently, delay in medical treatment must be interpreted in the context of the seriousness of the medical need, deciding whether the delay worsened the medical condition, and considering the reason for the delay. *Hill v. Dekalb R.Y.D.C.*, 40 F. 3d 1176, (11th Cir. 1994) (emphasis added). In support of their motion for summary judgement, the defendants have submitted various portions of the plaintiffs medical records from Washington State Prison as well as defendant Rogers' affidavit and the plaintiff's deposition. The medical records, affidavit and deposition indicate that the plaintiff has received medical treatment for her problems in accordance with medical and constitutional standards.

On January 9, 2001, plaintiff was transferred from Metro State Prison to Washington State Prison. She was examined upon arrival and her medical problems were noted to include hypothyroidism, COPD/sleep apnea, and arthritis in her left knee. She was prescribed Tagament, Calcium Carbonate, Levothroid, Glyburide, Batrim, Naprosyn, Menest

and Provera for her problems. Plaintiff also received an analgesic balm, mineral oil, an Albutrol inhaler and an Aerobid inhaler for medical conditions.

On January 10, 2001, a podiatry consult was requested for plaintiff due to keratosis, horny growths on her feet. The keratosis was noted to be consistent with verruca plantaris. The physician who examined plaintiff's feet recommended that she be given Carmol 40% cream for for weeks and Tagament.

Plaintiff refused medical treatment on February 24, 2001

Plaintiff had an x-ray on her right knee taken on March 5, 2001. The x-ray report showed no fractures or dislocations and the impression was noted to be degenerative changes. Approximately ten days later, an orthopedic consult was requested due to plaintiff's right knee pain. Also, at this time, all of her medications were reordered for a 6 month period.

On March 15,2001, plaintiff refused to be transferred from Washington State Prison for medical treatment because she did not want to wear leg irons because she felt they were

inhumane.

Plaintiff was issued various medical profiles on April 10,2001. These profiles included a bottom bunk, bottom floor, no prolonged standing for greater than 15 minutes, no walking, two pillows, a cotton blanket, no direct exposure to chemicals, no lifting more than 15 pounds and a bed wedge. On May 11, 2001, defendant Rogers altered plaintiff's no lifting profile from fifteen to ten pounds. He also ordered her orthopedic shoes for one year.

On May 16,2001, plaintiff missed her dose of Lasik-KCL, so a medical nonadherence for was prepared. She was educated on the importance of taking her medication, but plaintiff stated that she could not take her medication on the weekends, because she could not go to the bathroom. On this same day, plaintiff also complained of right ear pain and drainage. Mild erythema, redness and a yellowish drainage were noted in the ear canal. Plaintiff was diagnosed with external otitis and cortisporin was prescribed for seven days.

At a follow up examination the following day, plaintiff stated that her ear was much better.

Plaintiff had a MRI taken of her right knee on May 16, 2001. Osteoarthritic changes were seen in the medial compartment of the right knee as well as a small amount of joint effusion. Otherwise, plaintiff's right knee was grossly normal.

Plaintiff stated on June 12,2001, that her medical condition was improved and that she had no complaints. She was noted to be obese and to have chronic lower back pain. She was encouraged to exercise and loose weight.

A medication nonadherence form was prepared for plaintiff on July 11, 2001, because she missed her medication doses. Plaintiff stated that she chose not to take her medications on weekends.

A dermatology consult was requested for plaintiff's keratosis on July 13, 2001. However, on August 24, 2001, plaintiff refused to be seen by the dermatologist at Central

State Hospital because she believed she needed to be seen by a podiatrist.

Plaintiff was seen at the Chronic Care Clinic on September 6,2001, for complaints of leg swelling and calluses on her feet. Plaintiff demanded to see a podiatrist for her feet. However, it was noted that plaintiff had refused care from a dermatologist for her keratosis. Plaintiff was educated as to foot hygiene and her medications were renewed. She was also noted to be suffering from poorly controlled hyperthyroidism due to noncompliance with medication .

A podiatry consult was requested for plaintiff for an evaluation of her keratosis. Plaintiff was examined by a podiatrist on November 7,2001.

Plaintiff was seen at the medical clinic on October 26, 2001, for complaints of pain in her right fifth finger. Two weeks prior to going to medical, plaintiff slipped, fell, and struck her hand against a wall injuring her finger. She stated that she was unable to bend her fingers and that there was pain in

her distal interphalangeal joint. No swelling was seen and plaintiff had a good range of motion in her right hand. She was given a finger splint, x-rays were ordered. An appointment with a physicians assistant was also set up.

On October 29, 2001, plaintiff failed her vision test. She was also noted to have a mass in her right breast with pedal edema. Opthamology and radiology consults were requested.

On December 11, 2001, plaintiff underwent an eye examination. It was recommended that plaintiff receive new eyeglasses with increased bifocal power and a high intensity reading light for a library.

Plaintiff refused medical treatment on November 2,2001 because she was not in pain that morning.

On November 9,2001, plaintiff received whirlpool treatment for her keratosis. It was noted that plaintiff needed to follow a foot hygiene regime and be given closed toe shoes. Also on November 9, 2001, plaintiff's fifth right finger was x-rayed. No fractures or dislocations were seen and the

impression was a normal finger.

On November 13,2001, medical requested shoes with inserts for plaintiff in order to accommodate and prevent lesions. Plaintiff was fitted for the new shoes on February 1, 2002.

Plaintiff was again seen at medical on November 15, 2001. She was still complaining about pain in fifth finger of her right hand. She was referred to an orthopedist and educated on range of motion exercises for her finger.

Plaintiff requested a special reading light on December 12, 2001. Defendant Rogers noted that he would check with maintenance to see if such an accommodation was even possible.

On January 15,2002, Plaintiff refused to undergo a mammogram.

Utilization Management approved debridement of the lesions on plaintiffs feet on February 11, 2002.

Plaintiff was seen at Central State Hospital on February 12, 2002, to have her right fifth finger examined. Plaintiff was noted to have torn her extensor tendon from the

distal phalanx. The finger was placed in a splint. It was noted that permanent deformity was possible, but surgery was not recommended as it could lead to limited range of motion and other problems.

On May 6, 2002, plaintiff was given Carmol 40% cream for her feet. Thereafter, she was also issued profiles for no direct exposure to chemicals for one year, orthopedic shoes for 6 months, and shower shoes for 6 months.

Plaintiff was issued knee high stockings for her edema on June 16,2002. Shortly thereafter she was issued a sun hat for 6 months.

On June 18,2002, a consultation was requested so plaintiff could get new eyeglasses since she had the same pair for four years and was experiencing blurry vision. Plaintiff received her new glasses on August 15,2002. It was also noted on June 18th that plaintiff had suffered from Type II Diabetes for six years.

On July 2, 2002, an opthamology report showed

plaintiff had cataracts and possibly needed surgery for Macular Degeneration. The possibility of surgery was discussed with plaintiff. However, she stated that she did not want surgery because she was going to court.

Plaintiff was seen in medical on September 4,2002, for complaints of foot pain, lesions and toe numbness. She was noted to be suffering from chronic keratosis and had several severe callouses on both feet. She was referred for chronic care treatment and educated to keep her feet clean and washed. The next day she was referred to a podiatrist.

Plaintiff refused treatment for her cataracts on October 7, 2002. Plaintiff stated that she refused treatment because she wanted to see where she stood in court and so she could read about the surgery.

Plaintiff was seen by defendant Rogers on October 11, 2002. The podiatrist's recommendations were reviewed and discussed with her. Plaintiff agreed to a follow up visit. A podiatry consult was requested on October 17, 2002.

On December 6, 2002, a debridement of plaintiff's keratosis was recommended. Again a podiatry consult was requested.

Plaintiff complained that she needed someone to help her get off the toilet on January 8, 2003. The examining nurse noted that a toilet seat rise should be ordered for her. The riser was ordered the next day.

Plaintiff was seen at medical on January 27,2003, for complaints of leg and foot pain. She also complained of a leg rash. Plaintiff was noted to have mild swelling in both legs. Foot care and medication usage was discussed with her.

On February 3, 2003, it was recommended that plaintiff receive Plastazole Trilaminated Layers Insoles for her shoes. Plaintiff was transported to Milledgeville to be fitted for the insoles on March 21, 2003.

Defendant Rogers requested Plaintiff be provided with whirlpool treatment for fifteen minutes twice a week, for six weeks to help her severe keratosis. Utilization Management

approved the request on February 10, 2003.

A mammogam and ultrasound of the plaintiff's right breast were requested on February 28, 2003. It was noted that the mass had been there for over two years and that the plaintiff had refused treatment. The mammogram was completed on March 17, 2003.

On March 13, 2003 a consult was submitted for plaintiff's cataract surgery.

In the court's view, plaintiff LORUSSO-SMITH has completely failed to establish deliberate indifference on the part of the defendants to her medical needs, serious or otherwise. She has submitted absolutely no evidence to show that any of the defendant were deliberately indifferent to her medical needs. Therefore, the defendants are entitled to a summary judgement on this claim.

2. Conditions of Confinement

Plaintiff claims that she has been subjected to unsafe and unhealthy living and work conditions.

Specifically, plaintiff contends that there are terrible fumes at the Shelter Workshop, and that she has been made to sit there everyday. She also complains that she was assigned to the kitchen work detail although she is incapable of such work.

To prevail on an Eighth Amendment claim for damages § 1983, a plaintiff must prove these elements: 1) a condition of confinement that inflicted unnecessary pain or suffering; 2) the defendants deliberate indifference to that condition; and 3) causation. The first element requires that the condition must have inflicted unnecessary pain or suffering on the prisoner. Under the second element, plaintiff must show a defendants deliberate indifference to the condition. This element contains a subjective component: whether the defendant wantonly permitted the constitutionally infirm condition to persist. To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmates basic needs so that knowledge can be inferred. A plaintiff must prove that the official possessed knowledge of the infirm condition and

the means to cure that condition so that a conscious, culpable refusal to prevent the harm can be inferred from the defendants failure to prevent it. Thus, if an official attempts to remedy a constitutionally infirm condition, but fails in that endeavor, he cannot be deliberately indifferent unless he knows of, but disregards, an appropriate and sufficient alternative. The third element requires proof of an affirmative, casual connection between the actions taken by a particular person and the constitutional deprivation. Under this inquiry, the court's duty is to determine whether the official acts or omissions were the cause, not merely a contributing factor to, of the constitutionally infirm condition. *See LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993).

Contrary to heR unsubstantiated assertations, plaintiff was not subjected to unconstitutional conditions of confinement. In his affidavit, defendant Rogers states that the plaintiff has no medical condition that would prevent her from doing light duty work in the kitchen or shelter.

Further, according to plaintiffs own testimony, she only worked in the kitchen for about an hour. Tab # 54 at 36. As to the shelter workshop, inmates perform a knitting detail that does not generate any fumes. Therefore, the plaintiff was not subjected to cruel and unusual conditions of confinement and the defendants are entitled to summary judgement on these claims.

3 Environmental Tobacco Smoke

The Supreme Court has held that involuntary exposure to environmental tobacco smoke (ETS) can state a claim for cruel and unusual punishment under the Eighth Amendment. *Helling v. McKinney,* 509 U.S.25 (1993). In *Helling,* the court held that the Eighth Amendment protects against unreasonable risk of damage from ETS, including damage to the plaintiffs future health. *Id.* at 35. In order to prove deliberate indifference under the Eighth Amendment on the part of the defendants, the plaintiff must show both objective and subjective factors.

To show the objective factor, the plaintiff must show that he himself is being exposed to unreasonable levels of ETS. *Id.* Whether or not the prison has a formal smoking policy is relevant to this determination. *Id.* The objective factor also requires the court to "access whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* (emphasis in original) to such a risk." *Id.* at 36.

The subjective factor, deliberate indifference, should be determined in light of the prison authorities current attitudes and conduct. Id. at 36. This includes whether or not the prison has a smoking policy and how well it is administered. Id at 36-37.

In support of their motion for summary judgement, the defendants have submitted the plaintiffs medical records as well as the affidavit of defendant Chase. The medical records and affidavit indicate that the plaintiff's Eighth Amendment rights have not been violated by exposure to second hand smoke.

Defendant Chase avers that Washington State Prison only allows smoking in certain designated areas. Further, any inmate caught smoking in a non designated smoking area is issued a disciplinary report and will be sent to the hole for 7 to 14 days. Moreover, plaintiff's medical records show that she has not suffered any effects from exposure to second hand smoke.

In the courts view, plaintiff LORUSSO-SMITH has failed to establish that she was subjected to cruel and unusual punishment under the Eighth Amendment by exposure to ETS. The plaintiff has submitted no object evidence to show that she has been exposed to unreasonably high amounts of second hand smoke. Therefore, the plaintiff cannot meet the two part *Helling* test.

4. ADA

Plaintiff alleges that her rights under the ADA have been violated by the defendants because she has not been assigned to the E-2 dorm which is designated for handicapped

inmates. Plaintiff claims that she is handicapped and needs to be assigned to a handicap cell. Plaintiff also claims that she has been denied access to services within the prison due to he disabilities.

The Americans with Disabilities Act (ADA) is applicable to state prisons and state prisoners. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). To establish a claim under Title II of the Americans with Disabilities Act (ADA), plaintiff must show that (1) she is a qualified individual with a disability; (2) that she was excluded from participation in a public entity's service; and (3) such exclusion or discrimination was by reason of her disability. 42 U.S.C. § 12132.

In the present case, plaintiff cannot show that she is a qualified individual with a disability within the meaning of the Act. While it is apparent that the plaintiff suffers from several medical conditions, none of her disabilities are conditions that require handicap housing. Further, plaintiff has never been

denied access to any service or program within the prison. She simply chooses not to attend. Accordingly, the defendants are entitled to summary judgement on this claim [4]

5 Access To Courts

In her complaint, plaintiff alleges that defendant Riner ordered her mail destroyed. According to plaintiff, she was attempting to send a brief to the U.S. Supreme Court and defendant Riner ordered that the package be opened and inspected. Thereafter, some metal rods, a plastic divider, and a few pages of her document were removed from the package.

Prisoners have a constitutional right to a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977) (noting , however, prisoners need only be given a reasonably adequate opportunity of access, and not perfect access, to the courts; meaningful access to the courts is the touchstone). However, in order to properly raise

[4] Based on the above, plaintiffs claims under the Rehabilitation Act must fail as well.

a claim for denial of access to the courts, the plaintiff must show that she suffered an actual injury in her ability to present a nonfrivolous claim to the court. *Lewis v. Casey*, 518 U.S.343, 352-353 (1996). In other words, *Bounds* requires that inmates be provided with the tools necessary to attack their sentences and conditions of confinement. Any other litigating impairment is merely incidental to confinement and perfectly constitutional. *Id.* at 355.

Even assuming that plaintiffs mail were opened and a few pages were taken out, her allegations of denial of access to the courts do not state a claim for relief under §1983. As noted above, *Bounds* only requires that inmates be provided with the tools necessary to attack their sentences and conditions of confinement. Plaintiff does not complain that defendant Riner's alleged inspection of her mail prevented her from doing this. In fact, she admits that the documents were returned to her, but that a couple of pages were missing. Tab # 54 at 54. Accordingly, the defendants are entitled to

summary judgement on this claim.

6. Retaliation

Plaintiff also claims that she has been retaliated against by the defendants for filling suit. Plaintiff claims that for years she was classified as minimum security, but after filing suit her classification was changed to medium security. She also states that she has been placed in leg irons as a form of retaliation.

It is well settled that prison officials are to be afforded wide discretion in the exercise of their duties. See e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Wildberger v. Bracknell*,869 F 2d 1467,1468 (11th Cir. 1989), the court specifically reiterated that conduct that is not ordinarily offensive to the Constitution will be offensive if done in retaliation for filing lawsuits or grievance. However, simply crying "retaliation" whenever a prisoner does not agree with or like a decision made by prison officials is insufficient to state a claim for a constitutional violation under . Instead, the prisoner must come forward with sufficient evidence to merit continuation of his

lawsuit. *Harris v. Ostrout*, 65 F 3d 912 (11th Cir. 1995).

In the present case the plaintiff has failed to come forward with any evidence to show that she was retaliated against by the defendants. Plaintiff has provided absolutely no evidence to support her allegation that she was transferred to medium security in retaliation for filing a suit. Further, defendant Chase avers that it is common practice to handcuff inmates, including non violent inmates, when they are being transported somewhere to prevent escape. Therefore the plaintiff has failed to show a constitutional violation based upon a claim of retaliation and the defendants are entitled to summary judgement on this claim.

7. Remaining Claims

Lastly, plaintiff complains that the defendants have placed he in a number of dangerous situations in an attempt to murder her because she has knowledge of a conspiracy within the Georgia Department of Corrections. Plaintiff claims that the defendants have attempted to kill her by having her

electrocuted in the shower and by transporting her to a doctors appointment in a prison van without air conditioning during the summer. Plaintiff also claims that she was meant to fall while working kitchen detail.

As stated by the plaintiff, her claims that the defendants are trying to kill her are not cognizable under §1983. Plaintiff has submitted nothing beyond her own self-serving allegations to support her claims. Further, the affidavit of defendant Chase clearly shows that none of the defendants have attempted to have plaintiff killed. Tab # 51, Exhibit B.

Accordingly, IT IS RECOMMENDED that the defendants MOTION FOR SUMMARY JUDGEMENT be GRANTED [5]. Pursuant to 28 U.S.C. §636(b)(1) the parties may serve and file written objections to this RECOMMENDATION with the district judge to whom the case is assigned WITHIN TEN (10) DAYS after being

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[5] Also pending before the court are plaintiffs Request for Emergency Motion for Hearing (Tab # 58) and Request For Hearing Before the Court and Injunctive Relief (Tab #63) In light of the recommendationof this case, said motions are DENIED.

served with a copy thereof.

SO RECOMMENDED this 18th day of March, 2004.

"s/ Claude W. Hicks, Jr."

CLAUDE W. HICKS JR.
UNITED STATES MAGISTRATE
JUDGE

ENTERED ON DOCKET
3/18/2004
GREGORY L. LEONARD, CLERK

APPENDIX D

State Corrections found in contempt

Judge orders agency to hand over records

By BILL RANKIN
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The Georgia Department of Corrections has been found in contempt of court by a federal judge in Atlanta who has ordered the agency to turn over documents in a wrongful death case.

Senior U.S. District Judge Marvin Shoob made the finding in an order entered Tuesday. At issue are prison and medical records in a case brought by the mother of Damon Lee, an inmate at Autry State Prison in Pelham. Lee, 22, was beaten to death by his cellmate, Leon Murphy, on Feb. 7, 2002, the order said.

"We're disappointed that the case had to come to this but hope that now the judge has entered a contempt order the department and the state will begin to take Damon Lee's death seriously," said Atlanta lawyer Courtland Reichman, who represents Lee's mother, Johnnie Kitchen.

Bill Amideo, general counsel for the Department of Corrections, said this is the first contempt order he was aware of against the agency, which he has been defending since 1985. "I can assure you it's my intention to comply with it," he said.

If the agency fails to comply with Shoob's order, it could face monetary sanctions.

The lawsuit, filed last year, contends Lee and Murphy were improperly housed together because Murphy was a convicted murderer and an inmate with a known history of violence. Lee was serving 12 years for carjacking.

Lawyers for Lee's mother subpoenaed Murphy's prison and medical records. But the Department of Corrections refused to turn them over, calling them "confidential state secrets."

In his order, Shoob noted that the state's lawyers had said it did not have to turn over the records because they could be used as evidence. But the agency cannot object to the records' production, Shoob said, "simply because the documents may be harmful to their case."

APPENDIX
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NATION IN BRIEF

Panel to tackle prisons

Alarmed by the growing violence and abuse accompanying America's prison population boom, a private panel opened a series of national hearings in **Tampa** on Tuesday aimed at exploring why the corrections system has broken and how it can be fixed.

The Commission on Safety and Abuse in America's Prisons heard testimony, sometimes graphic, from former prisoners and jailers who detailed the horrors taking place behind bars, including rapes and beatings by guards and inmates.

Witnesses also testified to the difficulty of determining the prevalence of abuse. They spoke of spotty record keeping, limited access, punishment delivered to those who talk to outsiders and the jailers' culture of silence.

Federal statistics show that more than 2.2 million people are incarcerated, quadruple the number in 1980.